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IN THE
SUPREME COURT OF THE UNITED STATES

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WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

*Petitioner,*

v.

IRENE BLUMER,

*Respondent.*

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On Writ of Certiorari To The
Wisconsin Court of Appeals, District IV

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# BRIEF *AMICI CURIAE* OF AARP AND NCCNHR IN SUPPORT OF THE RESPONDENT

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## BRIEF *AMICI CURIAE* OF AARP AND NCCNHR

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### INTERESTS OF *AMICI CURIAE*[1]

AARP is a nonprofit membership organization of 35 million persons dedicated to addressing the needs and interests of Americans over the age of 50. Although only about five percent of older Americans reside in nursing homes at any given time, over the course of a lifetime, approximately 43 percent of all persons over the age of 65 will spend some time

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[1]Letters of consent from all parties have been filed separately with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

in a nursing facility.[2/] As the largest membership organization serving older Americans, AARP is deeply concerned that the expense of nursing home care can rapidly deplete the lifetime savings of older Americans. AARP has strongly supported the passage of both national and state laws that increase financial protections for spouses of nursing home residents who receive Medicaid. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for individuals of all ages. AARP has filed numerous briefs before this Court in cases involving people with disabilities and federal benefits, including, *Sims v. Apfel,* 530 U.S. 103 (2000); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

The National Citizens' Coalition for Nursing Home Reform (NCCNHR) is a national nonprofit organization whose members are actively involved in issues of nursing home reform and advocacy throughout the United States. Of particular interest to the Coalition are questions concerning full access to high quality of care and quality of life for people needing institutional care. Since Medicaid is the primary source of funding for long term care services, eligibility for Medicaid is a critical issue for the Coalition. The "resources first" rule reduces financial pressures on the community spouse, giving her additional time to visit her institutionalized spouse. Visitation by family improves quality of care and quality of life for residents. The Coalition has filed *amicus* briefs before this Court in cases affecting nursing home care, including *State of Wisconsin v. Bowen,* No. 86-648 (settled); *Yaretsky v. Blum,* 457 U.S. 991 (1982); *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980).

By written consent of the parties, *amici curiae* submit this brief in support of the Respondent.

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[2/]Enid Kassner, *Foreword* to William H. Crown, Brian O. Burwell & Lisa Alecxih, AARP, *An Analysis of Asset Testing for Nursing Home Benefits*, at i (1994).



## SUMMARY OF THE ARGUMENT

The high costs of nursing home care impoverish many older Americans. A nursing home stay of more than a year can wipe out the lifetime savings of most older families. Living on fixed incomes, older Americans are not likely to be able to replenish the assets that they spend on nursing home care. As a result, older Americans rely on Medicaid for assistance in paying for the enormous costs of nursing home care.

The Medicaid spousal impoverishment provisions of the Medicare Catastrophic Coverage Act sought to protect the community spouse, typically the wife, from impoverishment as a result of the overwhelming cost of nursing home care. Elderly widows have significantly lower income and assets than elderly married couples. The "resources first" rule helps to prevent the pauperization of the community spouse by preserving assets for her support after the death of the institutionalized spouse. Thus, the "resources first" rule is consistent with the purpose of the Act.

## ARGUMENT

### I. EXTENDED NURSING HOME STAYS IMPOVERISH OLDER AMERICANS, CAUSING THEM TO NEED MEDICAID BENEFITS TO REMAIN IN THE NURSING HOME

Few Americans can afford to spend more than a short period of time in a nursing home. The cost of nursing home care for one year averaged $56,000 in 1998.[3/] Neither Medicare nor private health insurance covers any substantial degree of long-term care services. Medicare covers primarily short-term stays (100 days or less in a benefit period) in skilled nursing facilities following a hospital stay. Private long-term care insurance accounts for under 1 percent of the

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[3/]Enid Kassner & Lee Shirley, AARP, *Medicaid Financial Eligibility for Older People: State Variations in Access to Home and Community-Based Waiver and Nursing Home Services* 1 (2000), *available at* http://research.aarp.org/health/2000_06_medicaid.html.

financing for long term care.[4] Only a small percentage of the wealthiest Americans have purchased private long-term insurance policies that pay for long-term care in nursing homes.[5]

Approximately 70 percent of nursing home residents rely on Medicaid to help pay for their nursing home care.[6] More than one million individuals received Medicaid assistance in paying for nursing home care in 1996. Medicaid is the largest source of financing for nursing home care in this country. Indeed, Medicaid is "our nation's primary response to the long-term care needs of its citizens."[7]

Medicaid has stringent income and asset limits that exclude all but the poorest Americans. However, due to the enormous costs of nursing home care, many older Americans become impoverished when they require extended long term care. Most older persons simply cannot afford the cost of nursing home care for more than a few months.

Approximately 9.7 percent of the nation's poor in 1999 were over age 65. In addition to the older Americans living below the poverty level, many elderly households are just above the brink of poverty. In 1999, 6.1 percent of persons age 65 and older were just above poverty but below 125 percent of poverty. An additional 20.1 percent of people over age 65 were between 125 and 200 percent of the poverty level.[8] The elderly are less likely than other adults to move

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[4]Joshua M. Wiener et al., *Catastrophic Costs of Long-Term Care for Elderly Americans*, in *Persons with Disabilities* 182, 182 (Joshua M. Wiener et al. eds., 1995).

[5]Kassner & Shirley, *supra*, at 1.

[6]Joshua M. Wiener et al., AARP, *Spending Down to Medicaid: New Data on the Role of Medicaid in Paying for Nursing Home Care* 1 (1996).

[7]Kassner & Shirley, *supra*, at 1, 11.

[8]AARP, *Beyond 50: A Report to the Nation on Economic Security* 28 (2001), *available at* http://www.aarp.org/beyond50/.



out of poverty, reflecting the fixed nature of elderly incomes.[9]

Similarly, the elderly are less likely than younger people to be able to replace the assets that they spend.[10] So, if an elderly couple spends almost all their assets on nursing home care for one spouse, there is little likelihood of replenishing those assets to support the other spouse.

Most elderly couples do not possess sufficient assets to pay for even a year of nursing home care for only one spouse. Excluding the value of home equity,[11] the median net worth for married couple households over 65 years of age in 1995 was $47,741.[12] Minority households, specifically black and Hispanic households, have significantly less assets than white households and are even less able to afford the steep cost of nursing home care.[13]

Middle class people who have been financially independent all of their lives often begin their stay in nursing homes paying on their own for their care. In 1993, about

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[9]*Id.* at 30; Frank B. Hobbs & Bonnie L. Damon, U.S. Census Bureau, U.S. Dep't of Commerce, P23-100, *Current Population Reports: 65+ in the United States* 4-16, 4-21, 4-22 (1996).

[10]Hobbs & Damon, *supra*, at 4-23.

[11]The home is an excluded asset in determining Medicaid eligibility. *Spending Down*, *supra*, at 28. *See also* 42 U.S.C. § 1396p(a)(2).

[12]Michael E. Davern & Patricia J. Fisher, U.S. Census Bureau, U.S. Dep't of Commerce, P70-71, *Current Population Reports: Household Net Wealth and Asset Ownership: 1995* xvii tbl. I (2001). Additional data regarding net wealth and asset ownership, as it fluctuated between 1995 and 1998, can be found in the Federal Reserve Board's Survey of Consumer Finances. *See generally* Arthur B. Kennickell et al., Division of Research and Statistics, Federal Reserve Board, *Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances* (2000), *available at* http://www.federalreserve.gov/pubs/bulletin/2000/0100lead.pdf.

[13]Davern & Fisher, *supra*, at xv fig. 6; *Beyond 50*, *supra*, at 46.

one-half of nursing home care expenses were paid out of pocket by older Americans.[14/] If older persons are discharged in a few months, they often do not seek Medicaid eligibility. Yet, if their care lasts longer, many residents are forced to spend a lifetime of savings, impoverishing themselves prior to obtaining government assistance to pay for their care.[15/]

The likelihood of needing long term care increases with age.[16/] As chronological age increases, people have a greater probability of having multiple chronic illnesses, and therefore requiring longer stays in nursing homes. While the American population is living longer, many elderly people "live their increased years with multiple illnesses and disabilities."[17/] In 1990, almost a quarter of Americans 85 years of age and older resided in nursing homes, and 90% of all nursing home residents were over 65 years of age.[18/]

Not surprisingly, the overwhelming majority of residents who spend down their assets to qualify for Medicaid are age 65 and older.[19/] Indeed, "[i]mpoverishment resulting from extended nursing home stays has, in effect, become a normal risk of aging."[20/] Medicaid is "a substantial safety net" for disabled and elderly people who are impoverished by the high costs of long term care.[21/]

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[14/] *Catastrophic Costs*, *supra*, at 183.

[15/] *Spending Down*, *supra*, at 19.

[16/] *Catastrophic Costs*, *supra*, at 196.

[17/] Hobbs & Damon, *supra*, at 3-14, 3-17.

[18/] *Id.* at 3-14, 6-9.

[19/] *Spending Down*, *supra*, at 19.

[20/] *Catastrophic Costs*, *supra*, at 183.

[21/] *Spending Down*, *supra*, at 29.



## II. THE "RESOURCES FIRST" RULE REDUCES THE PAUPERIZATION OF THE COMMUNITY SPOUSE AFTER THE DEATH OF THE INSTITUTIONALIZED SPOUSE

*Amici* agree with and strongly support the position of Respondent and other *amici* that the "resources first" rule is needed to achieve the goal of the Medicare Catastrophic Coverage Act of 1988. The purpose of the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act was to protect the community spouse, typically the wife, from being forced into poverty as a result of the overwhelming cost of nursing home care. *See* H.R. Rep. No. 100-105(II), at 65 (1988), reprinted in 1988 U.S.C.C.A.N. 857, 888; 134 Cong. Rec. H3854 (1988). The goal was to provide ongoing protection, not merely to delay impoverishment until after the death of the institutionalized spouse.

Individuals who die while in nursing home care are significantly more likely to have experienced longer nursing home stays than those who are discharged alive.[22/] So, the economic situation of the wife is usually precarious after the institutionalized spouse dies. The couple probably expended significant assets on nursing home care for the institutionalized spouse, and the couple's income is likely to decrease dramatically after the husband's death. The additional economic assistance provided by a small increase in asset income is essential in many cases to maintaining some measure of independence and dignity. The "resources first" rule carries out Congress' intent to keep the widow out of poverty.

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[22/] *Catastrophic Costs*, *supra*, at 196.

Women tend to live longer than men,[23] and are more likely to be the surviving spouse. In 1999, 32 percent of women over age 55 were widowed compared to only 9 percent of men of comparable age. As women age, the likelihood that they will be widowed increases rapidly. Indeed, 77 percent of women 85 years and older are widows.[24]

The poorest segment of the elderly population are unmarried (or widowed) women, and the likelihood of impoverishment increases with age. In 1999, 13.4 percent of unmarried women over 65 years of age lived in poverty, as did 9.7 percent of unmarried men over 65. In contrast, approximately 5 percent of married couple families 65 and over lived in poverty.[25] Women who are widowed are at a much higher risk of living in poverty.

Both older men and women living alone (most of whom are widowed) have significantly fewer assets than older married couples, likely reflecting the spending of those assets on medical care or long term care for the spouse who died.[26] While married couple households over age 65 had a median net worth (excluding home equity) of $47,741 in 1995, single men over age 65 had a median net worth of $15,374 and single women over age 65 had a median net worth of

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[23] Denise Smith & Hava Tillipman, U.S. Census Bureau, U.S. Dep't of Commerce, P20-532, *Current Population Reports: The Older Population in the United States: March 1999* 1 (2000). In 1999, the ratio of men to women age 55 and over was 81 men to 100 women. The male-female ratio drops steadily with age. For Americans age 85 and over, the male-female ratio was 49 men to 100 women. *Id.*

[24] *Id.* at 3.

[25] *Id.* at 4.

[26] *See* Cathleen D. Zick & Karen Holden, *An Assessment of the Wealth Holdings of Recent Widows*, 55 J. GERONTOLOGY: SOCIAL SCIENCES S90, S96 (2000).



$11,100.[27] Thus, after the death of a spouse, the surviving spouse has few assets to finance his or her own medical and long term care.

Moreover, after the death of an institutionalized husband, the wife is likely to obtain reduced pension and Social Security benefits, resulting in diminished income. "[T]he average household income of married women falls sharply in the United States when their husbands die, even when income measures are adjusted for the reduced consumption needs of the now smaller household unit."[28]

An AARP survey found that approximately half of the states do not impose any type of "spousal consent" requirement before a pension plan participant waives survivor benefits.[29] A widow in those states might not receive any survivor benefits after the death of the spouse who received the pension. Indeed, Census Bureau data from 1990 to 1992 show that only 59% of the widows of pensioners received any post-widowhood pension. In addition, even where pension income was reported, the post-widowhood pension income was 71% of the husband's pre-widowhood pension income.[30]

Similarly, the Census Bureau data show that Social Security benefits declined by almost 40% from the pre- to post-widowhood period among women widowed during the early part of the 1990s.[31] For a single-earner couple, during the lifetime of the working spouse, the retired worker receives a Social Security retired-worker benefit, and the nonworking spouse receives a benefit equal to 50 percent of that amount.

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[27] Davern & Fisher, *supra*, at xvii tbl. 1.

[28] Karen C. Holden & Cathleen Zick, *Insuring against the Consequences of Widowhood in a Reformed Social Security System, in Framing the Social Security Debate* 157 (R. Douglas Arnold et al. eds., 1998).

[29] AARP, *Falling Short: A 50-State Survey of Spousal Rights under State Pension Plans* iii (1994).

[30] *Insuring against the Consequences of Widowhood, supra*, at 166.

[31] *Id.* at 165-166.

After the death of the retired-worker spouse, the widow will be paid a benefit equal to the deceased worker's benefit, which amounts to only two-thirds of the combined pre-widowhood benefit. For a two-earner couple in which the spouses have identical covered-earnings history, after the death of a spouse, the surviving spouse receives only her own retired-worker benefit without any additional payments to compensate for the loss of the deceased spouse's benefits. For this two-earner couple, the post-widowhood Social Security income is only half of the pre-widowhood income.[32]

In order for a widow to maintain the same standard of living as when both spouses were alive, she needs to receive eighty percent of the couple's pre-widowhood income.[33] However, most widows do not receive eighty percent of the couple's income, since both their pension and Social Security income drop dramatically after the death of the spouse. As a result, "many married women face a significantly increased risk of poverty following the death of their husbands."[34]

The "income first" rule forces the community spouse to spend down the couple's assets and live on her husband's income during his lifetime. Yet, after his death, his pension or Social Security income, or a significant portion of it, may no longer be available to her. As a result, the "income first" rule greatly increases the risk that the community spouse will be impoverished after the death of the institutionalized spouse. In contrast, the "resources first" rule helps to reduce the pauperization of the community spouse, since it preserves assets for her support after the institutionalized spouse has died. Thus, the "resources first" rule is consistent with the purpose of the Medicare Catastrophic Coverage Act, *i.e.* to protect the community spouse from impoverishment.

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[32] *Id.* at 159.

[33] Karen C. Burke & Grayson M.P. McCouch, *The Impact of Social Security Reform on Women's Economic Security,* 16 N.Y.L. SCH. J. HUM. RTS. 375, 384 (1999).

[34] *Id.*



## CONCLUSION

For the reasons stated herein, *amici curiae* urge the Court to affirm the decision below.

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